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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 526

THE SIOUX TRIBE OF INDIANS,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

RALPH H. CASE,
Counsel for Petitioner.

JAMES S. Y. IVINS,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Sioux Tribe of Indians, by its attorney, Ralph H. Case, prays that a writ of certiorari issue to review the judgment of the Court of Claims (sustaining defendant's motion to dismiss plaintiff's supplemental petition) entered in the above entitled cause on June 28, 1948, Court of Claims Docket Number C-531(11), motion for new trial overruled November 1, 1948 (R. 329).

Opinions Below

The opinion of the Court of Claims sustaining dismissal of the supplemental petition is not yet reported in the Court of Claims Reports but appears in 78 Fed. Supp. 787. It appears in the Record at page 329. Previous opinions of the Court of Claims, sustaining claims and offsets appear

in 97 Ct. Cls. 391, and 105 Ct. Cls. 658, 64 Fed. Supp. 303. Record pp. 18 and 33.

Jurisdiction

The jurisdiction of this Court is invoked under section 288(b) of Title 28 of the United States Code as amended May 22, 1939, C. 140 (53 Stat. 752).

Statement

By the Treaty of September 17, 1851, the United States recognized the title in the Sioux Tribe of upwards of 100,000,000 acres of land west of the Missouri River and north of the Platte.

By the Treaty of April 29, 1868 (15 Stat. 635), the Sioux ceded to the United States the greater part of this area but reserved as a permanent reservation what is now that part of South Dakota west of the Missouri (some 28,000,000 acres) and reserved also hunting rights over some 39,000,000 other acres.

After the discovery of gold in the Black Hills, the Congress reduced the reservation to less than 21,000,000 acres and terminated the hunting rights. In 1889 the Government desired to take 9,265,592 acres more of the Sioux lands for settlement by whites, but under the Treaty of 1868 needed the written consent of three-fourths of the adult male Indians.

The Act of March 2, 1889 (25 Stat. 888) proposed a contract for approval by the Indians, and a commission was sent to explain it to the Indians.

On the basis of the construction placed upon the contract by the commission, more than three-fourths of the adult male Indians "signed" the agreement.

The construction given by the commission to the Indians (except to a small group who were surrendering no land)

was such as to justify them in believing that the money to be paid for their lands was to go into a permanent fund for the benefit of the whole tribe, and that *in addition* the Government would make certain payments, known popularly and later referred to in Statutes as "Sioux benefits," to induce individuals to take allotments in severalty in the remaining "diminished reservations" and go to farming.

The construction given by the commission to the Indians is at variance with the interpretation now placed upon the Act by the Court of Claims. The Court's interpretation also conflicts with the interpretation placed upon the Act by the Department of the Interior in 1889 and throughout the sixty years since, and conflicts with the interpretation subsequently given it by Congress as can be seen from numerous subsequent statutes.

Petitioner filed suit under the Act of June 3, 1920, which resulted in the decision by the Court of Claims dated December 7, 1942 (97 Ct. Cl. 391, 406), holding the defendant below accountable for $5,307,655.87 and interest and continuing the case for further proceedings.

In the further proceedings the Court below found that the Sioux Nation Fund, including both principal and interest, should have been, on June 30, 1925, the sum of $10,373,382.76. Against this there were charged the following disbursements, to which no exception is taken by petitioner:

Surveying and allotting	$ 634,466.99
Interest fund expenditures	4,183,767.21
Permanent fund expenditures	2,028,394.40
Total	$6,846,628.60

This should have left a net judgment for petitioner in the sum of $3,526,754.16.

However, the Court below held that the disbursements for Sioux Benefits to individual members of the Sioux

Tribe in the sum of $8,438,038.38 were gratuities chargeable against the Sioux Nation Fund (R. 47).

The payments called "Sioux Benefits" are made under the first proviso to Section 17 of the Act of March 2, 1889, 25 Stat. 888, at page 895, and were made only to those Sioux Indians who accepted allotment in severalty and who were the head of a family or single and over 18 years of age. The permanent appropriation to pay "Sioux Benefits" is part of the said first proviso to Section 17, supra, and all "Sioux Benefit" payments have been made and are now being made out of the Treasury of the United States.

No part of any payment of "Sioux Benefits" has ever been charged against the Sioux Nation Fund by the Department of the Interior, the Treasury Department or by the Comptroller General.

Subsequent to the repeal in 1935 of all permanent appropriations including that in Section 17 of the Act of March 2, 1889, the Congress has annually appropriated moneys from the general fund to pay "Sioux Benefits."

This set-off, which petitioner says is in error, resulted in the cancellation of the entire balance of $3,526,754.16 found by the Court below to be due petitioner—and further left a net excess of expenditures, over the sum due petitioner, amounting to $4,911,284.22.

After the Court of Claims rendered its decision allowing the set-off, on the basis of a construction of the Act of March 2, 1889 in complete conflict with the interpretation given it by the administrative and legislative branches of the Government for fifty-eight years, but while the case was still pending, the Congress amended the jurisdictional act under which the litigation originated,[1] to permit judgments for the Indians not only on claims founded in law or equity, but also on "claims based upon fair and honorable

[1] August 13, 1946, 60 Stat. 1049.

dealings that are not recognized by any existing rule of law or equity," and restricted off-sets generally to those warranted by "good conscience"—specifically excluding, inter alia, expenditures for "educational" purposes.[2]

This case was pending in the Supreme Court on petition for certiorari when the jurisdictional act was so amended, and the Supreme Court remanded it to the Court of Claims.

> "* * * to enable that Court to determine whether the Act of August 13, 1946 gives rise to any claims which petitioners may assert to affect the judgment heretofore entered * * *."

A supplemental petition was filed in the Court of Claims, based upon the existing record, claiming that the "Sioux benefits" paid to individuals were in effect for educational purposes and that, aside from that, the dealings between the Government and the Indians should be re-examined in the light of the new statute and the new tests set up therein.

The dismissal by the Court of Claims[3] of the supplemental petition was based upon an accompanying opinion containing numerous errors of fact and law additional to those contained in the opinion accompanying the judgment of February 4, 1946, *supra*.

Statutes Involved

The pertinent statutes are quoted in Appendix B, pp. 33-44.

Questions Presented

(1) Whether the Court of Claims failed to exercise the new jurisdiction conferred by the Act of August 13, 1946.

(2) Whether the so-called "Sioux Benefits" payable to individuals under Section 17 of the Act of March 2, 1889,

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[2] *Ibid.*, § 2. App. p. 42.
[3] June 28, 1948.

c. 405, 25 Stat. 888, 895, were properly chargeable against the permanent Sioux Nation Fund created by said section or a proper offset against the allowed claim of the plaintiff tribe for payments due from the United States under said act, especially in the light of Act of August 13, 1946.

(3) Whether the Court of Claims exceeded its jurisdiction to offset expenditures by the United States against the judgment in favor of the Indians.

(4) Whether it was error for the Court of Claims to hold that "Sioux Benefits" were not expenditures for educational purposes.

(5) Whether it was error for the Court of Claims to hold that the Sioux Commission explained to the Indians that "Sioux Benefits" would be charged against the Permanent Fund and that "there is no proof that establishes that any authorized official of the Government has ever placed a different interpretation upon the agreement."

(6) Whether the Court of Claims erred in holding that

> "On the record we find no substantial support for the view that fair and honorable dealing, • • • requires or justifies the conclusion these expenditures should be charged to the Government rather than to the plaintiff."

Reasons for Granting the Writ

(1) This case involves an important question of federal law which has not been but should be settled by the Supreme Court.

(2) The decision has the effect of nullifying, in large part, the Indian Claims Commission Act of August 13, 1946, not only as it affects this plaintiff and this claim, but as it may affect the claims of all other Indian Tribes not only before

the Court of Claims but before the Indian Claims Commission.

(3) The allowance of the offsets herein has been taken by the Court of Claims as setting up a debit balance against the Indians, on the basis of which that Court has dismissed the petitions in five other cases in which it found the plaintiff otherwise entitled to recover sums aggregating $2,423,166.15.

(4) The effect of the decision of the Court of Claims is to set up a debit balance against the Sioux Tribe which will leave it perpetually in debt to the United States, not only for transactions passed upon by the Court but for moneys which Congress has been and still is appropriating regularly in discharge of the recognized obligation of the United States.

(5) The Court of Claims has in effect found a deficiency judgment against the Sioux under which the United States could take every last acre of land remaining to the Sioux Tribe, without further compensation. The Court of Claims had no jurisdiction to do this.

(6) The decision of the Court of Claims is in conflict with (1) the contemporaneous administrative construction of the Act of 1889 at the time of its enactment, (2) the long-continued departmental construction (1889-1949) of that Act, and (3) the construction, in effect, given by Congress to that Act by the Act of May 21, 1928 (45 Stat. 684), the Act of June 18, 1934 (48 Stat. 984, secs. 14, 15), and every annual Appropriation Act since 1935.

(7) This is an action by an Indian tribe against the United States *as* guardian *and trustee* of a fund derived from the sale of petitioner's lands. The ward is morally

entitled to a decision by the highest court as to whether the trustee has properly executed its fiduciary function.

RALPH H. CASE,
Attorney for Sioux
Tribe of Indians.
National Press Building,
Washington, D. C.

Of counsel
JAMES S. Y. IVINS.

BRIEF

In this day when the United States complains so loudly of the aggression of dictators abroad, we ask the Supreme Court to grant a hearing to the victims of aggression at home.

For fifty-nine years the Sioux Indians, the Bureau of Indian Affairs, the Congress, and the General Accounting Office,[4] have acted upon the assumption that the contract under the Act of March 2, 1889 meant what the Indians and the majority of the Commission that negotiated it with them believed it to mean. The construction they have placed upon it is consonant with the established rules for interpretation of contracts and the settled rules for construction of statutes.

But the Court of Claims, ignoring all that was done under that assumption for fifty-nine years has held, in effect, that honorable and fair dealing requires that the Sioux Nation Fund and other funds, raised for the Sioux Tribe and its subdivisions by the sale of tribal lands, be charged with "gifts" made out of the "generosity" of the Government *to individuals*. These "gifts" were made to help the individuals develop into farmers and become self supporting and thus to diminish the burden assumed by the United States when it took the Black Hills and all the gold therein and agreed in exchange to care for the Indians until they should become self supporting.[5]

At a time when the United States is spending billions for the relief of people in foreign lands, for whose plight we are in no way to blame, fair and honorable dealing, according to the Court of Claims, requires that all the Sioux tribal funds be wiped out under a tremendous process of "Indian-giving" and that the Sioux be left so deeply in-

[4] Since its creation.

[5] Act of February 28, 1877, Art. 5. Appendix B, p. 34.

debted to the United States that all hope in the Indians of ever being anything but paupers on relief might as well be abandoned forthwith.

In 1888, failure crowned an effort to persuade the Sioux to give up part of the lands they still had left after the whittling down of their reservation in 1868 and 1877. In 1889, three commissioners went forth to the Sioux country to submit a redrafted proposition to the Indians on a take it or leave it basis. If the new proposition meant what the Court of Claims says it meant, the acceptance of it by the Indians would have been such a piece of crass stupidity as to constitute conclusive proof of their utter incompetence.

In order to justify its conclusion the Court of Claims has made a series of wholly unjustifiable findings of fact and statements in its opinion. They are in effect all included in the statement that "there is no proof that establishes that any authorized official of the Government has *ever* placed a different interpretation upon the agreement."[6] Thus in one sentence the Court of Claims brushes aside all the evidence showing the contemporaneous action of the Sioux commissioners, the Secretary of the Interior, the President and the Congress, and the consistent subsequent action for sixty years of the Bureau of Indian Affairs, the Treasury, the Comptroller General and the Congress.

The evidence shows that the three members of the Sioux Commission went to six Indian Agencies and conferred there with such of the Sioux as attended. A single member of the Commission also went to the Santee Agency and conferred with 140 members of a tribe which was being given some benefits under the Act of 1889.[6a]

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[6] R. 99.
[6a] R. 207.

The Commissioners told the Indians that the great Sioux Reservation contained an immense quantity of land in excess of what the Sioux could possibly use, that lands to both the east and west of it were occupied by whites, that the whites were anxious to connect up through the reservation and would probably manage to whether the Indians agreed or not, and that accordingly it was proposed in the bill that if the Sioux would surrender over nine million acres of their great reservation the Government would sell that land then belonging to the Sioux, for their account, and would buy such of this surplus land as it could not sell to settlers.

The Commission stressed to the Indians the desire of the Government to see them take allotments of land in severalty on diminished reservations, to go to farming or cattle raising thereon and to become self-supporting, so that they would no longer need rations from the Government. To induce the individual Indians to take allotments in severalty the Government proposed to do various things.[7]

The Commissioners told the Indians that, to assist them in farming or raising cattle, after taking allotments in severalty they were to be "given" oxen, cows, horses and farm implements.

Under the Treaty of 1868, the Sioux who took up farming were given certain cattle, equipment and money *at the expense of the Government*. The Commissioners stressed to the Sioux the proposition that the Act of 1889 was more liberal to them in this connection than the Treaty of 1868, giving them more cattle, etc. It is difficult to see how anybody would think that an Act which handed an Indian $500 worth of chattels *and made him pay for them himself* could be regarded as more liberal than one which gave him $350 worth at the expense of the Government. The only possible implication the Indians could have drawn was that if the

[7] App. A, pp. 22-30.

Act of 1889 was more liberal than the Treaty of 1868, the chattels to be received by the Indians were not to be charged to the Indians. Certainly there was no greater liberality in the Act of 1889 than in the Treaty of 1868 as far as concerned the land, for that was all owned by the Indians anyhow and the only difference was that the more that was taken up in severalty the less they would have left in common. The Commissioners recognized that the land all belonged to the Indians.

At some points the Commissioners instead of saying that stock, etc. would be *given* to the Indians, used the word "furnished," with the same implication that the cost thereof would not be charged to them.[8] At many points the Commissioners mentioned that the Government was going to buy 25 thousand cows and others things for the Indians. These were for all the Indians and the Court of Claims found that the cost thereof was not chargeable to the Sioux Fund. Immediately after speaking of the 25 thousand cows, etc., the Commission sometimes went right on to say that, further than this, the Government was buying for each Indian who took an allotment, horses, cows, etc., or that the Government was "*also giving*" to each such Indian stock and chattels. Absolutely no distinction was drawn to indicate that the 25 thousand cows would be paid for by the Government but that the additional stock given to allottees would be charged back again against the Sioux Nation Fund.

The Commissioners further stressed the fact that the schools extended for 20 years were to be entirely without cost to the Indians, and sometimes in the same breath, the Commissioners went on to mention the horses, cattle,

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[8] The English-Dakota Dictionary, compiled by Rev. John F. Williamson in 1902, gives the same Sioux word: "ku" for both *give* and *furnish*, but shows other words for *lend* and *loan*: "oku" and "inahni ku."

etc., without drawing any distinction in the manner of their acquisition.

At Pine Ridge, at Crow Creek, and at Cheyenne River, the Commission took pains to contrast the Indians' opportunity with that of the white settler, pointing out that the whites could homestead on only a fraction of the amount of land the Indians could take in allotment, and that the white man "must buy his own cattle, his own horses, his seeds," etc. The conclusion was unavoidable that the Indians would not have to buy these things *nor pay for them if the Government did the buying.*

At Pine Ridge, the Commissioners were speaking of the "generosity" of the Great Father, who "gives to you, my friend, if you do this, a span of American brood mares * * *." Where is any generosity involved in "giving" anything to a man and charging it to him?

The Commissioners continued, "More and more * * * he says I will issue you your clothing as now." The clothing was at Government expense. No distinction was drawn between who would pay for it and who would pay for the mares, etc.

The Commissioners in their report described the fund which would result from the sale of the lands as the "Permanent Fund." In talking to the Indians they stated that after the three million dollars to be advanced by the Government was repaid out of land sales, the fund would be held at 5 per cent interest for *50 years.* Even the dullest Indian would have realized that if all the "Sioux Benefits" to be given to allottees were to be charged against the Sioux Nation Fund, estimated by the Commissioners at five million dollars in excess of the three million that was to be advanced and recouped, there would be nothing left to stay out at interest for 50 years, but the Commissioners kept telling them that they estimated that a balance of five mil-

lion dollars would continue in the fund, a thought consistent only with the idea that the "Sioux Benefits" were not to come out of the fund.

It is inconceivable that the Indians would have accepted the proposition and signed on the dotted line if they had believed that all these wonderful *gifts* and inducements offered by the Commission were to be charged against *their* money received from the sale of *their land*. Except in two instances they did not even ask the question as to who was to pay for the beneficial objects to be allotted, and it is not conceivable that they would not have asked the question if they had thought that they were going to have to pay for the presents that were being so "generously" offered them.

In Nebraska, at the Santee Agency, outside of the great Sioux reservation, in the presence of 140 Santees, who were not regarded by the Sioux as owners of any part of the great Sioux reservation, Governor Foster, one of the Commissioners, was asked the direct question as to whether the money for the cows, etc. would come out of the Indians' fund or whether the Government would pay it. Governor Foster answered,

> "You are the first man who asked that question. The Commissioners have given this section a great deal of attention. The Department of the Interior has not instructed us as to the meaning of this section. Our opinion * * * is that the provisions for schools * * * the cost of which is to be paid by the Government and not out of the proceeds of the sale of your lands. The other things provided for in that section, the cost of these will come out of the proceeds of the sale of the lands."[9]

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[9] R. 212. Governor Foster volunteered a similar conclusion at Cheyenne River (p. 592 of Acct. 1), but later at the same meeting General Warner took the opposite view (R. 269).

Governor Foster admitted that he had had no instructions. He was only one of three Commissioners. He was talking to Santees (140 of them), who did not get along well with the Sioux. There is no evidence that what he said then was ever communicated to any of the 2600 Sioux addressed by the Commissioners at the Sioux Agencies or any other Sioux who signed the contract. The Santees might have been satisfied, because they were settled in Nebraska and were getting a windfall in anything that might be allocated to them out of the sale of Sioux lands in Dakota. But the Sioux would not have been satisfied unless they were very badly misled, because the Act of 1889, if interpreted to charge "Sioux Benefits," paid to individual allottees, against the Sioux Nation Fund, would have left them very much worse off financially than they would have been under the Treaty of 1868 or the Act of 1877.

The direct question was raised only once more. That was at Standing Rock when all three Commissioners were present with 500 Sioux, and John Grass raised the point. General Warner answered him saying,

> "The next question that you asked is as to the purchase of the cows and horses and the agricultural implements named in section 17. You asked if that money was to come from the three million dollars that was to be set aside as a fund in the treasury as soon as the treaty is ratified. I answer no" (R. 273).

In speaking of the three million dollar fund, obviously General Warner merely used that to designate the entire fund that would result from the sale of the land because no distinction is made in the statute between the use of the money to be temporarily advanced by the Government and the use of the moneys received from the sale of land.

One more item indicates the contemporary construction placed by the Commissioners on the statute. When the

Indians suggested that the fund derived from the sale of land should be divided into separate funds for each of the diminished reservations on a per capita basis, the Commissioners recommended this, and the Secretary of the Interior told the Indians at Washington that "the money that is to be paid will be recommended to be paid by the head according to each man so that every man in the Sioux Tribe will get his share," [10] they were all acting upon the theory that the Sioux Fund belonged to *all* the Sioux. This idea is completely inconsistent with the thought that the Fund could become entirely depleted by distributions of Sioux Benefits to *some* of the Sioux. In later years, as numerous Sioux have decided to leave the reservations, they have been paid their capita shares of the Sioux Fund,[11] regardless of whether or not they had previously had "Sioux Benefits" as allottees of land. This procedure is entirely inconsistent with the thought that the Sioux Benefits were chargeable against the Fund.

In its decision, the Court of Claims apparently ignored entirely the rule of law in regard to executive construction of a statute. Where a statute has been in effect for a long period of time and where the construction of that statute by the executive departments has been uniform, the Supreme Court has held that the executive construction is entitled to great weight and should not be disregarded or overruled except for the most cogent reasons. *United States* v. *Johnson,* 124 U. S. 236; *Brewster* v. *Gage,* 280 U. S. 327; *State of Wisconsin* v. *State of Illinois,* 278 U. S. 399, 413; *Louisville & Nashville Railroad Company* v. *United States,* 282 U. S. 740.

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[10] This was done, upon the recommendation of the President, by sec. 3 of the Act of Jan. 19, 1891. Appendix B, p. 38, 39.

[11] Finding 4 (p. 7 of decision of February 4, 1946), recognizes that $1,998,394.40 of the Fund was so paid out and properly charged against the fund. Cf. R. 238.

In the case at bar the construction has been that no part of the money expended for beneficial objects under the proviso of Section 17 of the Act of March 2, 1889 is chargeable against the Sioux Nation Fund arising out of the sale of lands under that Act. This has been the uniform executive construction for 60 years, and the Court should take notice of the fact that it is still today the construction of the executive departments having charge of this matter, particularly the Interior Department, the Treasury Department and the General Accounting Office.

The Act of March 2, 1889 involved two entirely distinct propositions:

First was the opening of lands for settlement by whites, and

Second the allotment of lands to individual Indians on the remaining reservations, and the encouragement of those Indians to engage in agriculture and become self supporting, thus relieving the Government of its existing obligation to support them.

As to the first: Tribal lands to be given up by the Indians for white settlement were to be sold for their account. Against the expected receipts the United States would advance $3,000,000 (to be recouped out of receipts from sales). The receipts were to constitute the Sioux Nation Fund which was set up for specified purposes for the benefit of *all the Sioux.*[12]

As to the second: To *individual* Indians taking allotments in severalty from the remaining tribal lands, were to be given, by the United States, certain livestock, agricultural implements, seeds, and cash—"Sioux Benefits"—, to assist them in becoming farmers.

The Tribe was to get *quid pro quo* for its surrendered lands, in the Sioux Nation Fund.

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[12] See Appendix B, pp. 34-38.

The United States was to get *quid pro quo* for the "Sioux Benefits" it was to give the individual Indians through relief from the continuing burden of supporting those who, for lack of hunting grounds, could no longer subsist in the manner of their forefathers.[13]

There was no inter-relation between the two propositions.

Section 17 of the Act of 1889 made two appropriations. The first was a permanent appropriation of whatever sums might be necessary to pay "Sioux Benefits" whenever allotments should be taken by individuals in severalty.

The second was an appropriation of $3,000,000 as an advance against the moneys expected to be received from the sale of surrendered tribal lands.

Had it been the intention of the Congress at that time to pay the Sioux Benefits out of the land fund, the appropriation for Sioux Benefits was absolutely unnecessary.

The permanent appropriation which is contained in the proviso of Section 17 of the Act of March 2, 1889, stood on the statute books continuously to 1933, and under the executive construction the Sioux Benefits provided for by Section 17 were delivered to the individual Sioux allottees. They were always charged to the permanent appropriation, never to the Sioux Nation Fund.

During that period of time, all of the individual Sioux Indians who were qualified in accordance with the proviso of Section 17, were allotted and Sioux Benefits were delivered to them, or the equivalent thereof in money was paid to them or credited to their accounts. By Section 19 of the Act of May 29, 1908,[14] allotments were directed to be made to children of Sioux parentage on the six reservations created by the Act of March 2, 1889.

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[13] See Art. 5 of Act of February 28, 1877. App. B, p. 34.

[14] 35 Stat. 451.

The Act of May 21, 1928 [15] provided for the payment of Sioux Benefits to the Sioux Indian children who had been or might be allotted under Section 19 of the Act of May 29, 1908. This Act (May 21, 1928) provided:

> "Claims therefor be paid as formerly from the permanent appropriation made by said Section 17 [of the Act of 1889] and carried on the books of the Treasury for this purpose."

The foregoing is a direct interpretation by the Congress of the original provision and appropriation for Sioux Benefits contained in Section 17 of the Act of March 2, 1889.

On June 18, 1934, the President approved the Act of Congress, 48 Stat. 984, which provided:

> "Sec. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 • • • *claims therefore to be paid as formerly from the permanent appropriation made by said section 17* and carried on the books of the Treasury for this purpose. • • •
>
> "Sec. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. *It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.*" (Emphasis supplied.)

By the Act approved June 26, 1934, 48 Stat. 1224, all "permanent appropriations" were given one more year to run and terminated at July 1, 1935.

But from 1935 to 1948 every Annual Interior Department Appropriation Act has made an appropriation out of

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[15] App. B, p. 41.

Treasury funds, in amounts varying between $150,000 and $250,000, under title "Annuities and Per Capita Payments," in these words:

> "For payment of Sioux Benefits to Indians of the Sioux Reservations as authorized by the Act of March 2, 1889 (25 Stat. at p. 895) as amended." [16]

It is a rule of law which has been overlooked by the Court of Claims in its decision, that where the Congress has, by subsequent enactment and with full knowledge of the executive interpretation of a statute, confirmed the statute by reenactment, such congressional action also confirms the practice and the construction of the executive department. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459; *National Lead Co.* v. *United States*, 252 U. S. 140; *Helvering* v. *Winmill*, 305 U. S. 79, 83, and cases cited in footnote 7 there.

What could be more inconsistent than all these reenacting statutes and the statement of the Court of Claims (R. 96) "which appropriation was intended to continue for a period of only ten years from February 10, 1890."

The effect of the Court of Claims decision is such that every time the Indian office pays to an individual a Sioux benefit, provided for under a current appropriation bill, the entire Sioux Nation becomes indebted, without its consent, to the United States for its repayment.

It would appear from the Court of Claims opinion that it has closed its mind to the question of jurisdiction conferred by the Act of August 13, 1946. The Court of Claims is superior to the Indian Claims Commission. All appeals on questions of law from the Commission go to the Court of Claims. Unless the Supreme Court interferes, this petitioner and all claimants in the Claims Commission as well

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[16] 49 Stat. 196; 49 Stat. 1780; 50 Stat. 491; 52 Stat. 318; 53 Stat. 713; 54 Stat. 432; 55 Stat. 330; 56 Stat. 530; 57 Stat. 471; 58 Stat. 485.

as other plaintiffs before the Court of Claims under the Act of 1946 are before a court with a closed mind.

This is demonstrated by the way in which the Court of Claims decision in this case is held by the Court of Claims to offset the allowed claims of petitioner in five other cases.

The Act of August 13, 1946 is a new statute which requires final judicial interpretation which can be given only by the Supreme Court.

It should be borne in mind that the issue arises not out of the plaintiff's claim—that has been allowed—but out of the defendant's asserted offset. The burden of proof is accordingly on defendant to show, under the Act of August 13, 1946, that *fair and honorable dealing* require that the "Sioux Benefits" be charged against the Sioux Nation Fund.

Respectfully submitted,

RALPH H. CASE,
Attorney for Sioux Tribe of Indians.

Of counsel
JAMES S. Y. IVINS.

APPENDIX A

EXCERPTS FROM THE RECORD SHOWING (1) REPRESENTATIONS MADE BY THE COMMISSIONERS TO THE SIOUX INDIANS TO INDUCE THEM TO ACCEPT THE TERMS OF THE ACT OF 1889, AND (2) SHOWING THE CONTEMPORANEOUS INTERPRETATION PLACED UPON THE ACT IN WASHINGTON BY THE COMMISSIONERS, THE SECRETARY OF THE INTERIOR AND THE PRESIDENT.[17]

I

Excerpts from transcript of proceedings of Commissioners in the Sioux country.

(227) [573] But you may well say, what good will all this land do me if I have nothing to improve it with? So great is the anxiety of the Great Father that you shall advance in the road of progress and civilization that he furnishes you the horses, the cows, and the implements and the seed and the money with which to improve this land. Now, my friends, let us see how much better he does by you than he does by his white children. If my friend here lived in my State, and came to the reservation when opened, with his family of five children, he could only get 160 acres of land, instead of 800 acres of farming land. He would have to buy his own horses, his own wagons, his own cattle, and his own seed; nothing would be given him. I appeal to the old men that I see before me if I wasn't justified in saying that never before was such an offer made to a people. But as I said you can't improve those lands without something to do it with. You can't plow up the ground with your noses, but you have got to have plows to do it with. You can't harvest your crops with your fingers, you have to have implements to do with. The weather is very drying and I expect my speech is drying also [laughter], so between the two you are having a pretty hard time.

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[17] The numbers in parentheses refer to the Supreme Court Clerk's pagination of the Record, the numbers in brackets refer to pagination of the court below.

Well, now my friends, let us see what is to be given to you. First, the Great Father is to purchase 25,000 cows to be distributed among your people, and 1,000 bulls; more than five cows to every head of a family in the Sioux Nation. And further, that if you shall hereafter determine to take your lands in severalty, he gives to each head of a family a pair of good American brood mares, not little ponies, a wagon, harness, a plow, a harrow, and certain other implements, and $50 in money, to enable you to put up a little house upon your land. Now, my friends, do you want these things?

(171) [517] The oxen, the cows, the horses, and the farming implements to be given you are mentioned in the agreement which you are asked to sign. More liberal in its terms, for your good, than was the treaty of 1868 which your fathers signed.

(235) [581] Now, as I stated in the commencement, the Great Father sees that you need the cattle, and the money with which to improve your lands and educate your children, and therefore under this bill, if it becomes a law, he buys for you 25,000 cows. These are given to you. That is about 5 cows to every head of a family upon the Great Sioux Reservation, and 1,000 bulls. This is to enable you to start in stock-raising, that you may get rich from the grass that your flocks eat. Those of you who take your lands in severalty, in addition he gives to each head of a family a span of American brood mares in place of the yoke of oxen, a wagon, harness, and agricultural implements named in the bill, and to each head of a family $50 in money, to enable him to build a little house upon his land, and the necessary seeds to plant 5 acres of ground for two years. And until you make plenty of money from your flocks and from the crops that you raise, the Great Father furnishes you the clothing for yourselves and family and the rations as furnished now. While the head of a family has the 1,600 acres of land, and the cows, and horses, and the wagon, and money, given him to improve it, the white man who settles upon the land that you are asked to sell can only get 160 acres, and

he must buy his horses and cattle, his own seed and his own agricultural implements. Was I not right in saying at the commencement that this bill was framed by your friends and not by your enemies?

(192) [538] My friends, I have told you the amount of land that you have. The Great Father is anxious not only that you should have these lands, but that you should improve them, and to this end furnishes you with stock, implements, food, and clothing. The bill provides that he is to buy 25,000 cows under the law, to be sent out. That would give to the Indians on this reservation, as near as I can estimate it, 6,000 cows. That is 5 cows to each male Indian over eighteen years of age. And also 1,000 bulls, and those of you who take your lands in allotment, he goes further than this, buying for each head of a family 2 mares and one set of harness, and to be good American brood mares. These are given in lieu of the yoke of oxen and chain, if the Secretary of the Interior believes it to be for your good. Also giving to each head of a family a wagon, harrow, plow, ax, hoe, hay-fork, and other agricultural implements with which to commence the improvement of your lands. Also giving to each Indian who will attempt to improve his land the necessary seeds to plant 5 acres in corn, wheat, potatoes, or such other crops as you can raise for two years, and also $50 in money to help you in putting up a house upon the land.

(202) [548] He [the white man] must buy his own cattle, his own horses, the seeds that he puts in the ground, and every bit of food that enters into the mouths of himself and children, and very stitch of clothing that goes upon their backs. But how has the Great Father dealt with you? He says I will give you this land to you and your children forever. But more, I will buy 25,000 head of good American cows, and 1,000 bulls, to be distributed among the heads of families throughout the reservation, which would bring to each head of a family upon this reservation nearly 5 cows, to enable him to raise cattle to eat this grass,

to put money in his pockets. His generosity does not stop at that my friends, but to each of you who takes your land in allotment, that is, have your land marked out as the white man has his land marked out, he gives to you my friend if you do this, a span of American brood mares, if the Great Father sees that you have made advancement that you can use those better than you could the yoke of oxen and the yoke and chain; a wagon to which to hitch your mares, the plow, the harrow, the hoe, the ax, and the hay-fork, and seeds of various kinds for two years with which to commence the cultivating of your soil, to plant a five-acre piece of ground, and $50 in money to enable you to put up a little house for yourself and children upon your ground, instead of wandering in the Tepee. More and more, he says that unaccustomed to farming you and your children may not make a success of it to start with; while you are striving to make a living, he says I will issue to you your clothing as now and your rations as now; they go on and this land besides.

(216) [562] The Great Father has done better than you asked. He says: "I will continue those schools for twenty years," and the Great Father pays for those schools himself, and not one cent of the money is to come out of what he pays you for the lands that you are asked to sell. And he says further that he will buy for your people upon the great Sioux Reservation, 25,000 cows—good American cows. That is 5 cows to every head of a family, and 1,000 bulls. And if you take your lands in severalty, that he will give to each of you who shows a disposition to improve his land, two good American brood mares, a wagon, harness, plow, and other implements, that you may improve your lands and raise your flocks and your herds, and give to each one $50 in money for the purpose of erecting a little house upon the land.

(224) [570] Now, under this bill, to help you along, you are given 25,000 cows—more than one cow for each Indian, including women and children. You have with these cows 1,000 bulls. You will have mares instead

of oxen, and almost all kinds of farming implements, and seed for 5 acres of land for two years for each head of a family.

(269) [615] So, my friends, the Great Father holds out his hand to you. * * * In his hand I believe he holds out the promise of prosperity and happiness to your race. It is for you wise men of this tribe, you young men, whose future is with this tribe, to say whether you will accept it. He says that if you want this he will buy 25,000 cows, more than one cow to every man, woman, and child of the Great Sioux Reservation, and 1,000 bulls, and that if you take your lands in severalty that he will give to each head of a family a span of American brood mares, wagon, harness, and two milch cows, and the agricultural implements named in the bill, and the seed to help you plant 5 acres of ground for two years. And further, that the rations to be issued to you shall continue as now; that the clothing issued to you shall continue as now.

So, my friends, am I not right in saying that he points out to you and your children the road to prosperity? Having all the land that you could wish, furnishing free of cost the schools for the education of your children, furnishing you the horses with which to improve your soil, and the cattle from which to raise your herds, and $50 in money with which to erect a little house upon the land which you shall take, it is for you, my friends, to say whether or not you want this, or whether you want to continue as in the past.

(301) [647] Now, you have asked to-day, as I understand your speaker John Grass, for certain constructions to be repeated, and have also said that you wanted the money belonging to each reservation to be kept separate, and to be placed by the Great Father to the credit of the people of that reservation. That is a matter, as John Grass has said, that we can not fix here, but it is one of which the Commission has thought of before coming to the Standing Rock Agency. And in making our report to the Great Father and his council

we shall recommend that the money belonging to the Standing Rock Agency be kept separate from that belonging to any other agency. And so with the money belonging to each of the other reservations. And in order that this may be done justly, so that you may get your full share, and your neighbors at the Cheyenne River and the other agencies may get their full share, the Great Father should have an exact count made of the number of men, women, and children upon each agency, and this we shall recommend in our report to the Great Father and his council. [Applause.] And I want to repeat here what I have said before, that the signing of this bill does not forfeit a single dollar that may be coming to you from previous treaties. We shall also say to the Great Father in our report, that under section 17 of this law, that the schools are to be continued as provided in the treaty of 1868, without costing you one cent. That is the true meaning of the law, and we as far as we can, and we believe the Great Father and his council will faithfully carry it out.

(172) [518] General Warner. The land of your reservation does not go to the Great Father. It belongs to you and your children, and it is to be sold at such prices as you want the Great Father to sell it for you, and the money goes to you and no one else. It is sold whenever you want it sold, and the money is for you and your children.

(240) [586] Now you are the owners with all the other Indians of this whole reservation.

(240) [586] Now, the minute this act becomes a law the Government places to the credit of the Indians $3,000,000, to bear interest at 5 per cent. It pays this 5 per cent. interest to help the Indians along, when it can borrow all the money it needs at half that amount. That is to remain there at 5 per cent. interest for fifty years.

(226) [572] The Great Father, looking out upon his red children, sees that you have made some advance-

ment. He wants to help you to advance far beyond where you are now. He wishes to furnish you horses, cattle, and the money wherewith you can improve the land that you have. It is for you to say whether you will accept this offer or reject it.

(233) [579] He furnishes the money to educate your children, and he furnishes you the cattle, the horses, and the implements to improve your land. He furnishes you the cows, the bulls, so that you may raise the stock to eat the grass that now is consumed by the prairie fires.

(241) [587] Now, I say we guess this land will bring about $8,000,000 in money, and that after all of the things are paid for that are provided in the bill, to be paid out of this money, there will be about $5,000,000 to stay on interest for fifty years for you. Now these figures I give you are the best we can give. We do not know that this is absolutely so, but that is the best we can figure it out with the means at our command.

(229) [575] Under this bill he sets aside $3,000,000, upon which he pays you 5 cents on each $1 a year, which is twice as much as he pays the white man whose money he has. One half of this interest is to be expended in the establishment of higher schools upon your reservation, and the other half to the purchasing of more agricultural implements and stock for you. And it provides further, that after $3,000,000 worth of land may be sold, if the $8,000,000 comes into the Treasury, that the Great Father may take one tenth of the principal in the Treasury to be expended in your education, buying stock for you, and paying you amounts in money. That would be nearly $50 apiece for every man, woman, and child of the great Sioux Nation; that is, to a family of six it would be $300 a year. Well might Governor Foster say that you would be the richest people on the face of the globe.

(211) [557] Now the Government pays 5 per cent. interest on this money. It can borrow all the money it

wants at 2.5 per cent. One-half of this interest money goes each year to the educational fund, I mean the higher educational fund, and not to the common school education; and the balance of the interest to such other purposes as the President and Secretary of the Interior may think best for you. This fund remains in the hands of the Government for fifty years. In that time the Government will have paid in extra interest more than it needs to pay, $4,000,000.

(236) [582] Your children want to be mechanics, and he sets aside $3,000,000 for industrial schools for your children, upon which he pays you 5 per cent. interest a year; that is $150,000 a year. One-half of that sum ($75,000) goes to building your industrial schools, agricultural schools, and in maintaining them. The other half is paid out each year to buy additional stock and agricultural implements as you may need them. In this, my friends, the Great Father pays you double the amount of interest that he pays the white man whose money he gets. At the end of fifty years this $3,000,000 and all of the other money that is paid in for your lands is distributed among you and your children.

(246) [592] At the end of fifty years the money is to be divided among the Indians. It is believed by that time it will be perfectly safe to turn this money over to the Indians.

(293) [639] The Government can borrow at 2.5 per cent.—in fact, it does not need to borrow at all. Now, it gives you 5 per cent. This is to help the Indian along in this rapid growth that I have been talking about. Now, to just simply take the $3,000,000 for the fifty years the Government will hold it, let us see how much more interest it pays you than it would have to pay if it borrowed it from other people. If you will get your young men to figure it out you will find that on the $3,000,000, saying nothing about the further sum that will be added, it will pay $3,750,000 more interest than it can borrow this money for. When you are considering the price of land this $3,750,000 should be taken into

account. If any other safe government or banking institution was to take your money you would get 2.5 per cent. So I insist that it is fair to add this $3,750,000 to whatever the land sells for. We think more ought to be added because we believe your permanent fund will reach $5,000,000. If it should reach $5,000,000, then you can add another $1,000,000 of extra interest that the Government will pay you. I think if you will fairly consider this, that this extra interest, nearly $4,000,000, may be considered a part of what you are going to get for the land.

(293) [639] General Crook. My friends, John Grass said in a part of his speech that we might interpret this bill one way and after a while a new set of men would come in and they interpret it differently. Now, everything that is said, and all the constructions we have placed upon this bill, are taken down, and will go to the President, so that if he opens the reservation he will have to open it upon the construction we put upon this bill, otherwise it will fall to the ground.

II

From the report of the Sioux Commission, December 24, 1889 (123 ff) [469 ff]

(127) [473] The construction of the provisions of the Act of March 2, 1889 (Public, No. 148), was left to the Commission. Its construction was accepted by the Indians at the various agencies and became a part of the contract between them and the Government in signing the deed for a part of their lands. If the deed signed by the Sioux Indians is accepted it should carry with it the constructions placed on the act of March 2, 1889, by the Commission.

(140) [486] The Indians of this generation should be made to feel that the performance of the nation is equal to its promises. Whatever legislation is needed to carry into effect the provisions of the act of March 2, 1889, (Public, No. 148) should be enacted at an early day. The Indians having ceded their lands they should

receive the full consideration promised. The Commission recommends the following legislation:

First.—An appropriation to enable the Department to furnish the Indians with the mares, cows, bulls, agricultural implements, seeds, cash payments, to assist them in agricultural pursuits. Their land being chiefly valuable for grazing purposes, the Indians being better adapted at present to tending herds than to tilling of the soil, they should be furnished in the early part of the coming spring with cattle, teams, and reasonable cash payments, and also such agricultural implements as they can be induced to use. The interest of the permanent fund should be made available at once. That industrial and agricultural schools may be established on each of the reservations in the near future. This legislation the Commission deem of first importance. This interest, if insufficient, should be supplemented by additional appropriations.

(141 [487] *Third.*—Legislation should be enacted dividing the "permanent fund" arising from the sale of the lands between the different reservations, giving to each reservation such a part of such fund in proportion as the number of its Indians receiving rations and annuities are to the whole number of such Indians of the Sioux Nation, on all the different reservations. This legislation is asked for by all the Indians, and, in the opinion of the Commission, is wise.

From the report of the Secretary of the Interior to the President, January 30, 1890 (108 ff) [454 ff]

(110) [456] The acceptance of the act of 1889 was made by the Indians signing and sealing a printed form, which also contained a quitclaim of their interests in the ceded territory, and is thus presented in the form of *a deed.* The Commissioners in their report state that if the deed as signed by the Sioux Indians is accepted, it should carry with it the construction placed on the act of March 2, 1889, by the Commission.

(118) [464] In my own judgment, the act should now be proclaimed, the surveys made as soon as

possible, and the Secretary of the Interior required, so far as he may, without further legislation, to carry into effect the recommendations of the Commission; and the further recommendations of the Commission be transmitted to Congress for action by it in accordance with the spirit and fair understanding of the negotiations exhibited to have taken place between the Commission and the Sioux.

It may be relied upon, I think, that the legislative branch of the Government will execute what it believes to have been this understanding with the Indians, in good faith. "The burdens assumed are light in comparison with the benefits obtained, and there will be no substantial reason for refusing to supplement the act assented to by such further provisions as are recommended to make it fair and acceptable."

From the message of President Harrison to the Congress, February 10, 1890 (105) [451 ff]

(106) [452] At the outset of the negotiations the Commission was confronted by certain questions as to the interpretation and effect of the act of Congress which they were presenting for the acceptance of the Indians. Upon two or three points of some importance the Commission gave, in response to these inquiries, an interpretation to the law, and it was the law thus explained to them that was accepted by the Indians. The Commissioners had no power to bind Congress or the Executive by their construction of a statute, but they were the agents of the United States, first to submit a definite proposition for the acceptance of the Indians, and, that failing, to agree upon modified terms, to be submitted to Congress for ratification. They were dealing with an ignorant and suspicious people, and an explanation of the terms, and effect of the offer submitted could not be avoided. Good faith demands that if the United States expects the lands ceded, the beneficial construction of the act given by our agents should be also admitted and observed.

APPENDIX B

Act of June 3, 1920, 41 Stat. 738

That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.

Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or bands of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any bands

thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for the said tribe or bands of Indians. • • •

Act of February 28, 1877, 19 Stat. 254

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Art. 5. In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one-half pound of bacon,) one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. • • •

Act of March 2, 1889, 25 Stat. 888

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Sec. 17. That it is hereby enacted that the seventh article of the said treaty of April twenty-ninth, eighteen hundred and sixty-eight, securing to said Indians the benefits of education, subject to such modifications as Congress shall deem most effective to secure to said Indians equivalent benefits

of such education, shall continue in force for twenty years from and after the time this act shall take effect; and the Secretary of the Interior is hereby authorized and directed to purchase, from time to time, for the use of said Indians, such and so many American breeding cows of good quality, not exceeding twenty-five thousand in number, and bulls of like quality, not exceeding one thousand in number, as in his judgment can be under regulations furnished by him, cared for and preserved, with their increase, by said Indians: *Provided,* That each head of family or single person over the age of eighteen years, who shall have or may hereafter take his or her allotment of land in severalty, shall be provided with two milch cows, one pair of oxen, with yoke and chain, or two mares and one set of harness in lieu of said oxen, yoke and chain, as the Secretary of the Interior may deem advisable, and they shall also receive one plow, one wagon, one harrow, one hoe, one axe, and one pitchfork, all suitable to the work they may have to do, and also fifty dollars in cash; to be expended under the direction of the Secretary of the Interior in aiding such Indians to erect a house and other buildings suitable for residence or the improvement of his allotment; no sales, barters or bargains shall be made by any person other than said Indians with each other, of any of the personal property hereinbefore provided for, and any violation of this provision shall be deemed a misdemeanor and punished by fine not exceeding one hundred dollars, or imprisonment not exceeding one year or both in the discretion of the court; That for two years the necessary seeds shall be provided to plant five acres of ground into different crops, if so much can be used, and provided that in the purchase of such seed preference shall be given to Indians who may have raised the same for sale, and so much money as shall be necessary for this purpose is hereby appropriated out of any money in the Treasury not otherwise appropriated; and in addition thereto there shall be set apart, out of any money in the Treasury not otherwise appropriated, the sum of three millions of dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund, the interest of which, at five per centum per annum, shall be appropriated, under the

direction of the Secretary of the Interior, to the use of the Indians receiving rations and annuities upon the reservations created by this act, in proportion to the numbers that shall so receive rations and annuities at the time this act takes effect, as follows: One-half of said interest shall be so expended for the promotion of industrial and other suitable education among said Indians, and the other half thereof in such manner and for such purposes, including reasonable cash payments per capita as, in the judgment of said Secretary, shall, from time to time, most contribute to the advancement of said Indians in civilization and self-support; and the Santee Sioux, the Flandreau Sioux, and the Ponca Indians shall be included in the benefits of said permanent fund, as provided in sections seven and thirteen of this act: *Provided*, That after the Government has been reimbursed for the money expended for said Indians under the provisions of this act, the Secretary of the Interior may, in his discretion, expend, in addition to the interest of the permanent fund, not to exceed ten per centum per annum of the principal of said fund in the employment of farmers and in the purchase of agricultural implements, teams, seeds, including reasonable cash payments per capita, and other articles necessary to assist them in agricultural pursuits, and he shall report to Congress in detail each year his doings hereunder. And at the end of fifty years from the passage of this act, said fund shall be expended for the purpose of promoting education, civilization, and self-support among said Indians, or otherwise distributed among them as Congress shall from time to time thereafter determine. * * *

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Sec. 19. That all the provisions of said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, and the agreement with the same approved February twenty-eighth, eighteen hundred and seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding. * * *

* * * * * * *

Sec. 21. That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain, except American Island, Farm Island, and Niobrara Island, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law (except section two thousand three hundred and one thereof) and under the law relating to town-sites: *Provided,* That each settler, under and in accordance with the provisions of said homestead acts, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, the sum of one dollar and twenty-five cents per acre for all lands disposed of within the first three years after the taking effect of this act, and the sum of seventy-five cents per acre for all lands disposed of within the next two years following thereafter, and fifty cents per acre for the residue of the lands then undisposed of, and shall be entitled to a patent therefor according to said homestead laws, and after the full payment of said sums: but the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged, except as to said sums: *Provided,* That all lands herein opened to settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre, which amount shall be added to and credited to said Indians as part of their permanent fund, and said lands shall thereafter be part of the public domain of the United States, to be disposed of under the homestead laws of the United States, and the provisions of this act; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of final entry, shall be null and void: * * *

Sec. 22. That all money accruing from the disposal of lands in conformity with this act shall be paid into the Treasury of the United States and be applied solely as follows: First, to the reimbursement of the United States for all necessary actual expenditures contemplated and pro-

vided for under the provisions of this act, and the creation of the permanent fund hereinbefore provided; and after such reimbursement to the increase of said permanent fund for the purposes hereinbefore provided. * * *

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Sec. 28. That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians, concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent, shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required, by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation of this act becomes of no effect and null and void. * * *

Act of January 19, 1891, 26 Stat. 720

That the following sums, or so much thereof as may be necessary, be, and the same are hereby, appropriated, out of any moneys in the Treasury not otherwise appropriated, to be immediately available to enable the Secretary of the Interior to comply with and carry out certain provisions of the act of Congress approved March second, eighteen hundred and eighty-nine (public one hundred and forty-eight, Statutes twenty-five, page eight hundred and eighty-eight), and for other purposes:

For the erection of day and industrial schools, providing furniture and other necessary articles, and pay of teachers, in accordance with article seven of the treaty of April twenty-ninth, eighteen hundred and sixty-eight, which said article of treaty is continued in force for twenty years by section seventeen of the above-mentioned act of March second, eighteen hundred and eighty-nine: *Provided,* That as fast as school facilities are furnished the Secretary of the Interior is hereby authorized and required to compel all

children between the ages of six and sixteen to attend the schools on the reservation at least nine months in the year, except such as may be attending school elsewhere, one hundred and fifty thousand dollars.

For the erection of fifteen school buildings, provided for in article twenty of the above-mentioned act of March second, eighteen hundred and eighty-nine, fifteen thousand dollars.

To enable the Secretary of the Interior to pay to such individual Indians of the Standing Rock and Cheyenne River Agencies as he shall ascertain to have been deprived by the authority of the United States of ponies in the year eighteen hundred and seventy-six, at the rate of forty dollars for each pony: *Provided,* That the sum paid to each individual Indian under this provision shall be taken and accepted by such Indian in full compensation for all loss sustained by such Indian in consequence of the taking from him of ponies as aforesaid: *And provided further,* That if any Indian entitled to such compensation shall have deceased the sum to which such Indian would be entitled shall be paid to his heirs at law, according to the laws of the State of Dakota, two hundred thousand dollars.

To enable the Secretary of the Interior to purchase for the Sioux Nation of Indians additional beef required for issue, the rations having been reduced on account of reduced appropriation for the fiscal year ending June thirtieth, eighteen hundred and ninety, one hundred thousand dollars.

To enable the Secretary of the Interior to purchase lands for such of the Santee Sioux Indians in Nebraska as have been unable to take lands in severalty on their reservations in Nebraska by reason of the restoration of the unallotted lands to the public domain, thirty-two thousand dollars.

Sec. 2. That the funds appropriated by this act shall not be liable to be covered into the Treasury, but shall remain on said books until used and expended for the purposes for which they have been appropriated.

Sec. 3. That the principal of the permanent fund provided for under section seventeen of the said act of March second, eighteen hundred and eighty-nine, dividing a portion of the reservation of the Sioux Nation of Indians in Dakota

into separate reservations, and for other purposes, shall be divided in proportion to the number of Indians entitled to receive rations and annuities upon the separate reservations created by the above act, or residing and belonging thereon at the time the said act took effect, and the Secretary of the Treasury shall carry the amount of principal of said permanent fund belonging to the Indians of each of the diminished reservations to the credit of the Indians of each of the said diminished reservations, separate and distinct from each other, and the principal as well as the interest of each of said funds shall be expended for the purposes specified in said article seventeen of the above-mentioned act, only for the use and benefit of the said Indians so entitled to receive rations and annuities upon each of the said separate diminished reservations or so residing and belonging thereupon.

Sec. 4. That the Secretary of War be, and he is hereby, authorized and directed when making purchases for the military post or service on or near Indian reservations to purchase in open market, from the Indians as far as practicable, at fair and reasonable rates, not to exceed the market prices in the localities, any cattle, grain, hay, fuel, or other produce or merchandise they may have for sale and which may be required for the military service. * * *

Act of June 10, 1896, 29 Stat. 334

The Secretary of the Interior is hereby authorized and directed to ascertain the number of Sioux and Ponca Indians in South Dakota and Nebraska who would not be benefited by the fulfillment of the proviso of section seventeen of an Act entitled "An Act to divide a portion of the reservation of the Great Sioux Nation of Indians in Dakota into separate reservations and secure the relinquishment of the Indian title to the remainder, and for other purposes," approved March second, eighteen hundred and eighty-nine, by the receipt from the United States of the articles of personal property therein mentioned and who desire to have the same converted into money, and in lieu of such articles of personal property, or any part thereof he may think proper, the Secretary of the Interior shall convert or com-

mute the same, or so much thereof as he may think proper, into money, and pay the amount thereof to such Indians; and the payment under the provisions of this Act shall be held to be a liquidation of the obligation of the United States to said Indians under that portion of said section seventeen, so far as the articles of personal property therein named are concerned.

Act of June 21, 1906, 34 Stat. 326

* * * * * * *

That in lieu of the milch cows, mares, and implements to be issued to Sioux allottees under the provisions of section seventeen of the "Act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes," approved March second, eighteen hundred and eighty-nine, the Secretary of the Interior may, in his discretion, issue to any allottee entitled to benefits under said section who shall petition therefor an equal value in good stock cattle.

Act of May 21, 1928, 45 Stat. 684

That the Secretary of the Interior be, and he is hereby, directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (Twenty-fifth Statutes at Large, page 894), or their commuted cash value under the Act of June 10, 1896 (Twenty-ninth Statutes at Large, page 334), to all Sioux Indians who shall have taken or may hereafter take allotments of land in severalty under section 19 of the Act of May 29, 1908 (Thirty-fifth Statutes at Large, page 451), and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse.

Section 14 of the Act of June 18, 1934, 48 Stat. 984

The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (25 Stat. L. 895), or their commuted cash value under the Act of June 10, 1896 (29 Stat. L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (35 Stat. L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose.

• • •

Act of August 13, 1946, 60 Stat. 1049

• • • • • • •

Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any

existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

* * * * * * *

Sec. 11. Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: *Provided*, That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has been or will be authorized: *Provided further*, That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 526.

THE SIOUX TRIBE OF INDIANS, *Petitioner*,

v.

THE UNITED STATES.

MEMORANDUM IN REPLY TO BRIEF FOR THE UNITED STATES.

We are concerned, under the amendment of 1946, with "*fair and honorable* dealings" and "*good conscience*".

When the Commissioners explaining the terms of the agreement to the Indians, made dozens of representations which anybody but an astute trial lawyer would have understood as indicating that the Sioux Benefits would not be charged against the Sioux Nation Fund, there was no reason for simple illiterate aborigines to suspect a quibble and ask the *direct* question. The quibble appears in the brief for the United States where it is said (p. 11) that "the matter came up for discussion twice"—when, obviously, it was headed off on a score of occasions [see excerpts reprinted as appendix to petitioners brief] by representa-

tions which completely satisfied the Indians that they were not being tricked, and that there was no need to ask the direct question.

Respectfully submitted,

RALPH H. CASE,
Attorney for Sioux Tribe of Indians,
National Press Building,
Washington, D. C.

Of Counsel:
JAMES S. Y. IVINS.

INDEX

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OCTOBER TERM, 1948

No. 526

THE SIOUX TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (R. 330-338) is reported at 78 F. Supp. 787. Prior opinions (R. 22-32 and R. 87-102) are reported at 97 C. Cls. 391 and 105 C. Cls. 658, respectively.

JURISDICTION

The judgment of the Court of Claims was entered on June 28, 1948 (R. 339). A motion for new

trial was denied on November 1, 1948 (R. 339). The petition for writ of certiorari was filed on January 28, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1255(1).

QUESTION PRESENTED

Whether the requirement of the Act of March 2, 1889, 25 Stat. 888, that petitioner bear the cost of supplying allottees with the benefits provided in section 17 thereof was altered by the Act of August 13, 1946, 60 Stat. 1049.

STATUTES INVOLVED

The pertinent provisions of the Act of March 2, 1889, 25 Stat. 888, are set forth in the Statement.

Sections 2 and 11 of the Act of August 13, 1946, 60 Stat. 1049, 1050, 1052, provide:

> Sec. 2. * * * In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part

of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

Sec. 11. Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: *Provided,* That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending

or authorized suit in the Court of Claims has been or will be authorized: *Provided further,* That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.

STATEMENT

The Great Sioux Reservation was created by Article II of the Treaty of 1868, 15 Stat. 635. It was reduced in size by Article I of the Agreement of 1876, which was ratified by the Act of February 28, 1877, 19 Stat. 254 (R. 75). It was further diminished by the Act of March 2, 1889, 25 Stat. 888, the statute directly involved here. Having been accepted by the Indians, that Act was made effective on February 10, 1890, by proclamation of the President, 26 Stat. 1554 (R. 74). Its pertinent provisions may be summarized as follows:

Sections 1-6 divided petitioner's remaining lands into six reservations. Section 8 empowered the President to cause the new reservations to be allotted in severalty to the Indians resident thereon. It provided that, if sufficient lands were available, each head of a family should be allotted 320 acres; each single person over 18 and each orphan under 18, 160 acres; and each other person under 18 then living or who might be born prior to the date of the order directing an allotment, 80 acres.

Section 17 directed that each head of family or single person over 18 who should take an allotment under section 8 should be supplied with certain livestock, tools, seeds and cash. It provided:

> so much money as shall be necessary for this purpose is hereby appropriated out of any money in the Treasury not otherwise appropriated; and in addition thereto there shall be set apart, out of any money in the Treasury not otherwise appropriated, the sum of three millions of dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund * * *.

Provision was made for crediting the "permanent fund" with interest at the rate of five per cent per annum and for the use of the interest by the Secretary of the Interior for the benefit of the Indians receiving rations and annuities upon the new reservations. Finally, section 17 provided:

> * * * That after the Government has been reimbursed for the money expended for said Indians under the provisions of this act, the Secretary of the Interior may, in his discretion, expend, in addition to the interest of the permanent fund, not to exceed ten per centum per annum of the principal of said fund in the employment of farmers and in the purchase of agricultural implements, teams, seeds, including reasonable cash payments per capita, and other articles necessary to assist them in agricultural pursuits * * *.

Section 21 provided that the lands ceded by petitioner and restored to the public domain should be disposed of to settlers under the homestead laws. It specified the prices to be paid by settlers and declared:

> Provided: That all lands herein opened to settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act [February 10, 1890] shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre, which amount shall be added to and credited to said Indians as part of their permanent fund * * *.

Section 22 provided:

> That all money accruing from the disposal of lands in conformity with this act shall be paid into the Treasury of the United States and be applied solely as follows: First, to the reimbursement of the United States for all necessary actual expenditures contemplated and provided for under the provisions of this act, and the creation of the permanent fund hereinbefore provided; and after such reimbursement to the increase of said permanent fund for the purposes hereinbefore provided.

Petitioner brought this suit to recover the amount due for the lands ceded to the United States (R. 1-15). The Court of Claims found that the United States had received 9,261,592.62 acres under the cession, that the land had been opened to settle-

ment, and that at the end of ten years, a large part remained undisposed of, and was accepted by the United States at fifty cents an acre (R. 21). It concluded that petitioner was entitled to a credit of $5,307,655.87 (R. 21). It added (R. 23):

> But that fact, in itself, does not create even a *prima facie* liability on the part of the defendant in this suit. The defendant could perform its duty under the agreement as well by expending the money for plaintiff as by holding it for plaintiff.

Accordingly, it directed further proceedings. The United States submitted a report prepared by the General Accounting Office. The report embraced all transactions between the United States and the petitioner down to June 30, 1925. Upon the basis of this report, the court made the following findings of fact:

Sections 21 and 22 of the 1889 Act contemplated that at the end of the ten years mentioned in section 21, i. e., as of February 10, 1900, there would be a settlement between the United States and the petitioner. But the United States never set up this account (R. 38-39). The Act also contemplated that during the ten-year period expenditures for allottees pursuant to section 17 would be made out of Treasury appropriations, but that, at the end of such period, appropriations for this purpose would cease (R. 45, 61). And at that time the sums which had been appropriated were to be paid back from

the proceeds of the disposed lands (R. 45, 61). However, thereafter Congress continued to make appropriations for payments to allottees. As of June 30, 1925 (the end of the period covered by the Comptroller General's report), these appropriations amounted to $8,427,329.54 (R. 65-66). The court held that the petitioner was chargeable with these expenditures (R. 96-99).

Petitioner applied for a writ of certiorari, No. 368, October Term 1946. On October 21, 1946, the petition was denied. 329 U. S. 758. Thereafter, petitioner filed a motion for rehearing and for an order remanding the cause to the Court of Claims. On December 9, 1946, this Court entered its order vacating the lower court's judgment and remanding the cause "in order to enable that court to determine whether the Act of August 13, 1946, 60 Stat. 1049, gives rise to any claims which petitioners may assert to affect the judgment heretofore entered in this cause, as to which this Court means to intimate no opinion." 329 U. S. 684.

On August 26, 1947, petitioner filed in the Court of Claims a supplemental petition asking that court to reconsider the case in the light of this Court's mandate (R. 319-327). The United States moved to dismiss on the ground that all the questions raised by the supplemental petition had been fully considered by the court before it entered the judgment vacated by this Court and that the Act of August 13, 1946, contains nothing to change the

result then reached (R. 328). On June 28, 1948, the court below entered judgment dismissing the supplemental complaint and restoring the vacated judgment (R. 339). In its opinion (R. 330-338), it held (R. 337):

> We think Congress was dealing fairly and honorably with the plaintiff tribe when it imposed the requirement that the expenditures in question be reimbursed to it out of the funds derived by the tribe from the sale of the surplus lands. The expenditures were strictly advancements by the Government from public funds, without obligation, as was the advancement of the $3,000,000, and, in fairness, the plaintiff tribe should be required to repay the same.

ARGUMENT

Section 17 of the Act of March 2, 1889, made two appropriations: The first was for the purpose of supplying allottees with specified equipment. The second was to set up the "permanent fund" of $3,000,000. As section 22 (p. 6, *supra*) makes plain, the United States intended to be reimbursed for these appropriations from the money received from the sale of the ceded lands. Any excess was to be added to the permanent fund. It was intended that a balance should be struck as of February 10, 1900.

As it turned out, a large part of the ceded lands were not sold and had to be taken over by the United States. The balance was not struck: The Government did not credit petitioner with the

amount due on the lands. On the other hand, Congress continued to appropriate money for allottees and as of 1925 had expended $8,427,329.54 for this purpose. In holding that these expenditures discharged the Government's liability for the ceded lands, the Court of Claims was clearly right.

Since the Act of March 2, 1889 is clear, there is no warrant for resorting to extrinsic sources in order to determine its meaning. *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 278; *United States* v. *American Trucking Associations*, 310 U. S. 534, 543. However, nothing brought forward by petitioner casts doubt on the result reached below. The fact that after the ten-year period Congress continued to make appropriations for the purpose of supplying allottees (see Pet. 4, 7, 17-20) is perfectly consistent with an intent that ultimately the United States would be reimbursed. The circumstance that Congress rightly recognized that these appropriations were not chargeable against the "permanent fund", which was to be used for other purposes (see p. 5, *supra*), is equally insignificant on the question of whether the expenditures were to be repaid.[1]

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[1] Petitioner quotes (p. 19) section 15 of the Act of June 18, 1934, 48 Stat. 984, providing that expenditures from appropriations authorized by that Act should not be considered as offsets. That provision is inapplicable to this case. As has been shown (pp. 7-8, *supra*), none of the expenditures here taken into account were made after 1925.

There is no basis in the record for petitioner's contention (Pet. 3, 4, 7, 9-17) that the Indians were led to believe that these payments under section 17 were to be gratuitous. So far as the records of the negotiations show, the matter came up for discussion twice and on each occasion, the Indians were told that the payments would have to be reimbursed. Thus, as petitioner concedes (Pet. 14), the Indians of the Santee Agency were told that the benefits to be paid would "come out of the proceeds of the sale of the lands" (R. 213). On the other occasion, 12 chiefs and about 500 Indians of the Cheyenne River Agency were present (R. 243). They were told (R. 246):

> * * * Now, as I told you the other day, we do not know how good these lands are or how much money they will bring, but we guess that it will bring about $8,000,000. Now, as soon as you accept this act the Government places to your credit $3,000,000 at 5 per cent. interest. * * * Now, the schools that are provided for in section 17 are to be paid for by the Government, and not out of your money.
>
> The rations and annuities provided for in the treaty of 1876 are paid for by the Government and not out of your money. Now, when the Government gets the $8,000,000—if it gets it, it will take out of that $8,000,000 the $3,000,000 that it first puts to your credit. *It takes out also what it pays for cows and mares and agricultural implements, and what is left*

is added to the $3,000,000 that was first set apart for the Indians. * * * [Italics added.]

Clearly, therefore, the court below was amply supported by the record in finding that the Indians understood and agreed when they signed the agreement that the articles and payments to be furnished and made under sec. 17 would be paid for out of the proceeds from the ceded land (R. 99, 334-336; and see R. 61, 97).[2]

Petitioner's contention (Pet. 6, 20-21) that on the basis of "fair and honorable dealing" the United States should bear the burden of these expenditures (sec. 11, Act of August 13, 1946, pp. 3-4, *supra*), depends wholly upon its assertions that Congress and the Indians so interpreted the 1889 Act. Since these assertions are unfounded, the contention must fail. In any event, the conclusion of the Court of Claims that "fair and honorable dealings" required the petitioner to repay the advancements made by the Government, is clearly correct. Consequently, the Act of August 13, 1946, does not give rise to any claim which affects the judgment previously entered by the Court of Claims, which has now been reinstated by that court.

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[2] General Warner's statement at Standing Rock cited by petitioner (p. 15) that the money would not come from the "permanent fund" was of course correct. It has no tendency to show that the Indians were led to believe that the money would not have to be repaid.

CONCLUSION

The decision below is correct and the case does not warrant review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
JOHN F. COTTER,
JOHN R. BENNEY,
Attorneys.

MAY 1949.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 527

THE SIOUX TRIBE OF INDIANS,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

RALPH H. CASE,
Counsel for Petitioner.

JAMES S. Y. IVINS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 527

THE SIOUX TRIBE OF INDIANS,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Sioux Tribe of Indians, by its attorney, Ralph H. Case, prays that a writ of certiorari issue to review the judgment of the Court of Claims (sustaining defendant's motion to dismiss plaintiff's supplemental petition) entered in the above entitled cause on June 28, 1948, Court of Claims Docket Number C-531 (18), (19), (21), (23) and (24), motion for new trial overruled November 1, 1948 (R. 138).

Opinions Below

The opinion of the Court of Claims sustaining dismissal of the supplemental petition is not yet reported in the Court of Claims Reports but appears in 78 Fed. Supp. 793.

It appears in the record at page 129. The previous opinion of the Court of Claims sustaining claims and offsets appears in 105 Ct. Cl. 725, 64 Fed. Supp. 312, Record p. 33.

Jurisdiction

The jurisdiction of this Court is invoked under Section 288(b) of Title 28 of the United States Code as amended May 22, 1939, c. 140 (53 Stat. 752).

Questions Presented

(1) Whether the Court of Claims complied with the requirements of Section 11 of the Act of August 13, 1946, in respect to applying to offsets the test of good conscience in the light of the nature of the claim and the entire course of dealings between the United States and the claimants.

(2) Whether the Court of Claims exceeded its jurisdiction in allowing offsets of expenditures prior to the acts under which the claims arose.

Statutes Involved

Many of the statutes referred to are set out in Appendix B to the petition for certiorari in the companion case, No. 526, filed herewith, and reference thereto is hereby made. Other statutes are shown in the appendix hereto.

Statement

In these cases the Court of Claims has held as a matter of law that several bands of the Sioux Tribe of Indians are entitled to recover, under an accounting for the proceeds of the disposition or sale of lands within their reservations,

and for misappropriation or misapplication of their tribal trust funds, in amounts aggregating $2,423,166.10.[1]

The Court of Claims also held, however, that the defendant was entitled to offset against these awards $4,911,284.22 of "net excess expenditures" determined in the companion case of *Sioux Tribes of Indians* v. *United States*, No. 526, —in which a petition for certiorari is being filed with this one.

If it should be determined in the companion case that the Court of Claims erred in charging "Sioux Benefits" against the Sioux Nation Fund, automatically the offset allowed in this case will disappear and the Sioux bands will be entitled to the amounts previously determined in their favor.

But even if the action of the Court of Claims in the companion case should be affirmed, the allowable offset in this case must be reduced because the jurisdiction of the Court of Claims to allow offsets was restricted by the Act of August 13, 1946, in two respects:

(1) Offsets of gratuities (which the Court of Claims recognizes the offset here to be) were limited to those justified in good conscience in the light of the nature of the claim and the entire course of dealings and accounts between the United States and the claimant, and (2) offsets were not to be made for "expenditures made prior to the date of the law under which the claim arose."

If it is held that the Court of Claims as the keeper of the conscience of the United States should not have allowed the "excess expenditures" of "Sioux Benefits" to offset the claims of the bands for the balances due them in their special

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[1] Case C-531 (18) Rosebud Band $547,347.60
" " (19) " " 338,256.40
" " (21) Crow Creek Band 23,347.60
" " (23) Cheyenne River Band 751,784.25
" " (24) Standing Rock Band 762,430.25

trust funds, the awards totaling $2,423,166.10 should become judgments for plaintiff bands.

Even if it should be held that good conscience justified the offset of "excess expenditures" of Sioux Benefits made since the enactment of the several statutes under which the claims arose, the Act of 1946 specifically disallows as offsets such expenditures made prior to the dates of those laws. Accordingly the $4,911,284.22 "excess expenditures" carried over by the Court of Claims from the companion case must be reduced by at least $2,793,489.54, so expended before the dates of those laws. The portion of the "excess expenditures" disbursed since the enactment of those laws would be at most $2,171,794.68, leaving an aggregate balance in favor of the plaintiff's bands of at least $251,371.42 for which they would be entitled to judgment, with interest.

Reasons for Granting the Writ

I

The Court of Claims first decided this case under the jurisdictional Act of June 3, 1920, which provided for offsets for "all sums heretofore paid or expended for the benefit of said [Sioux] tribe or any band thereof." The question of whether "Sioux Benefits" paid for the benefit of *individuals* is a proper offset is raised in the companion case. Even if gratuitous payments by the United States to individuals were a proper offset under the Act of June 3, 1920, an entirely different question arises under the Act of August 13, 1946, which amended the Act of 1920. Under the amendment, offsets of gratuitous expenditures must be examined from a *conscience* rather than a strictly legalistic angle. Section 11 of the Act of 1946 continues cases pending in the Court of Claims or the Supreme Court at the time of its enactment, saying that they shall not

be transferred to the Commission created by the act to adjudicate Indian claims generally, with a proviso that

> "the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has or will be authorized."

Section 2, referred to, provided that

> "the Commission *may* also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it *finds* that the nature of the claim and the *entire course of dealings* and accounts between the United States and the claimant *in good conscience warrants such action, may* set off all *or part of* such expenditures against any award made to the claimant, except[2] * * * (emphasis supplied).

When the Supreme Court remanded this case to the Court of Claims to determine whether the Act of 1946 gives rise to any claims which the petitioner may assert to affect the judgment which had been the subject of a petition for certiorari, the Court of Claims merely reiterated its previous legalistic conclusions and made no new approach in the light of the entire course of conduct, no findings as to what good conscience requires, but merely stated that

> "We find from the record in these cases that the Act of August 13, 1946, does not give rise to any claim or claims which plaintiff may legally, equitably, or in good conscience assert to affect the judgment heretofore entered in these cases on February 4, 1946."

We submit that the remand by the Supreme Court, in using the phrase "claims which the petitioner may assert",

---

[2] The exception will be considered below.

was not intended to mean only affirmative demands but included positions which petitioner might take with respect to the offsets *claimed* by the Government. The Court of Claims, using the phraseology of the remand, skips over its *purpose,* which was to reexamine the record in the light of the amended jurisdictional act and make findings with respect to the good conscience not of plaintiff's claims but of defendant's offsets. The attitude of the Court of Claims is that the situation was not changed by the Act of 1946. This is a precedent for all other Indian cases in the Court of Claims, and for the Claims Commission, which must get its law from the Court of Claims (under Section 20 of the Act of 1946).[3] It certainly should be passed on by the Supreme Court so that the Court of Claims, the Indian Claims Commission and the litigant parties may know whether or not the statutory reference to *good conscience* and the *entire course of dealings* means something or is just one more instance of telling the Indians something that sounds favorable and later saying that the words mean something else.

II

The exception in the Act of 1946, where it limited offsets to those justified in good conscience, is

> "except that it is hereby declared to be the policy of Congress that monies spent for * * * expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose * * * shall not be a proper offset against any award."

In plaintiff's brief filed September 8, 1948, the attention of the Court of Claims was called to the fact (of record) that more than half of the offsets carried over by the Court

[3] 60 Stat. 1949.

from the companion case and applied against the awards herein had been expended prior to the enactment of the several laws under which the awards herein arose. There plaintiff showed the Court of Claims:

> "The attention of the Court is invited to the fact that certain specific classifications of offsets or counterclaims are barred by the Act of August 13, 1946. We have reference particularly to expenditures made prior to the date of the laws, treaties, or Executive Orders under which the claims arose.
>
> "The claims in question are those arising out of the sale of so-called surplus land (and may we add at this point that there is no such thing as surplus land) under several acts of Congress.
>
> "A portion of the deficiency judgment has been allocated and charged against trust funds arising under statutes for the sale of lands which statutes were passed after a substantial portion of the expenditures in question had been made. There is an absolute prohibition in the statute against the use of such offsets against an Indian claim (sec. 2 of Act of August 13, 1946).
>
> "We have reference particularly to case No. C-531 (18), Rosebud, Tripp County, Fund, Act of March 2, 1907 (34 Stat. 1230). Prior to the date of this act the evidence in this case (Rep. G.A.O. pp. 321-324) shows the total expenditure under civilization of the Sioux, sec. 17, Act of March 2, 1889, *supra*, over the years from 1894 to 1906, inclusive, was $488,750.98.
>
> "In case No. C-531 (19), Rosebud, Mellette County, Fund, under the Act of May 30, 1910 (36 Stat. 448) the evidence (Rep. G.A.O. p. 324) for the years 1908-9-10 shows that there were corresponding expenditures, which now are part of the deficiency judgment, in the sum of $34,523.62.
>
> "In case No. C-531 (20), Pine Ridge, Bennett County, Fund, arising under the Act of May 27, 1910 (36 Stat. 440) there had been expended in the years 1894 to 1910

the total sum of $756,141.87, (Rep. G.A.O. pp. 306-307) which is now a part of the deficiency judgment.

"In case No. C-531 (21), Crow Creek 4% Fund, arising under the Act of March 2, 1889, *supra*, no expenditures were made for Sioux benefits prior to the date of the act. Note here that the act itself authorized the adjustment of the Sioux Nation Fund and made an appropriation therefor. In consequence there could be no prior expenditures in this particular case.

"In case No. C-531 (22), Lower Brule Trust Fund, arising under the Act of April 21, 1906 (34 Stat. 124), Sioux benefits paid prior to said act (Rep. G.A.O. p. 345) for the years 1894-5-6 were $32,873.98.

"In case No. C-531 (23), Cheyenne River 3% Fund, arising under the Act of May 29, 1908 (35 Stat. 460) as amended by the Act of June 23, 1910 (36 Stat. 602), under which Act the claim arises, Sioux benefits paid prior to June 23, 1910 in the years 1894, 1895, 1899, 1902 and including the year 1910 amounted to $444,-035.78 (Rep. G.A.O. p. 313).

"In case No. C-531 (24), Standing Rock 3% Fund, arising under the Act of May 29, 1908 (35 Stat. 460), as amended and expanded by the Act of February 14, 1913 (37 Stat. 675), under which Act the claim arises, Sioux benefits paid prior to the date of said last act for the years 1894 to 1913 inclusive, amounted to $1,023,-163.31 (Rep. G.A.O. p. 330).

"So far and to the extent above set out the deficiency judgment charged against the several Sioux tribal trust funds is barred by the act. In a previous section, we have asked this Court to strike out the entire deficiency judgment as a matter of equity, good conscience and fair dealing. But in the event our plea fails, still the Court is bound by the statute to set aside so much of the deficiency judgment as is now involved and as is now shown to be expenditures made prior to the date of the law under which the claim arose.

* * * * * * *

"A summary of the foregoing Sioux benefits paid prior to the passage of the statutes giving rise to the present claims, is as follows:

No. C-531 (18)	$ 448,750.98
C-531 (19)	34,523.62
C-531 (20)	756,141.87
C-531 (21)	None
C-531 (22)	32,873.98
C-531 (23)	444,035.78
C-531 (24)	1,023,163.31
Total	$2,739,489.54"

This is a question of the Court's *jurisdiction* of the matter of allowable offsets, under the amended jurisdictional act. It can be raised at any time.[4]

The Court of Claims chose to ignore this point completely, but has assigned no reason.

RALPH H. CASE,
Attorney for
Sioux Tribe of Indians,
National Press Building,
Washington, D. C.

Of Counsel:
JAMES S. Y. IVINS.

[4] *American Hide & Leather Co.* v. *United States*, 284 U. S. 343, 359, and cases there cited.

APPENDIX

Act of June 3, 1920, 41 Stat. 738

That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.

Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or bands of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based,

and said petition shall be signed by the attorney or attorneys employed and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for the said tribe or bands of Indians. * * *

Act of August 13, 1946, 60 Stat. 1049

* * * * * * *

Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

* * * * * * *

Sec. 11. Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: *Provided,* That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court

of Claims has been or will be authorized: *Provided further*, That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.

Act of March 2, 1907

An Act to authorize the sale and disposition of a portion of the surplus or unallotted lands in the Rosebud Indian Reservation, in the State of South Dakota, and making appropriation and provision to carry the same into effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty-five west of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians: * * *

Sec. 5. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation, in the State of South Dakota, the sum of one million dollars, which shall draw interest at three per centum per annum for ten years, the interest to be paid to the Indians per capita in cash annually, share and share alike; that at the expiration of ten years, after one million dollars shall have been deposited as aforesaid, the said sum shall be distributed and paid to said Indians per capita in cash; that the balance of the proceeds arising from the sale and disposition of the lands as aforesaid shall be deposited in the Treasury of the United States to the credit of said Indians and shall be expended for their benefit under the direction of the Secretary of the Interior, and he may, in his discretion, upon an application by a majority of said Indians, pay a portion of the same to the Indians in cash,

per capita, share and share alike, if in his opinion such payments will be for the best interests of said Indians. * * *

Act of May 30, 1910, 36 Stat. 448

An Act to authorize the sale and disposition of a portion of the surplus and unallotted lands in Mellette and Washabaugh counties in the Rosebud Indian Reservation in the State of South Dakota, and making appropriation and provision to carry the same into effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Indian Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Washabaugh, south of the White River, and being described and bounded as follows: * * *

Sec. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization. * * *

Act of May 27, 1910, 36 Stat. 440

An Act to authorize the sale and disposition of the surplus and unallotted lands in Bennett County, in the Pine Ridge Indian Reservation, in the State of South Dakota, and making appropriation to carry the same into effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Pine Ridge Indian Reser-

vation, in the State of South Dakota, lying and being in Bennett County and described as follows: * * *

Sec. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of the said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization. * * *

Act of April 21, 1906, 34 Stat. 124

An Act to authorize the sale of a portion of the Lower Brule Indian Reservation in South Dakota, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of * * * being the western portion of the Lower Brule Indian Reservation in South Dakota, comprising approximately fifty-six thousand five hundred and sixty acres: * * *

Sec. 3. That the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, shall, after deducting the amounts of the expenses incurred from time to time in connection with the appraisements and sales, be deposited in the Treasury of the United States to the credit of the Indians belonging and having tribal rights on the Lower Brule Reservation, and shall be expended for their benefit, under the direction of the Secretary of the Interior. * * *

Act of May 29, 1908, 35 Stat. 460

An Act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River

and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota lying and being within the following described boundaries, to-wit: * * *

Sec. 6. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the reservations aforesaid in the States of South Dakota and North Dakota the sums to which the respective tribes may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians respectively shall be expended for their benefit under the direction of the Secretary of the Interior. * * *

Act of June 23, 1910, 36 Stat. 602

An Act to authorize the Secretary of the Interior to sell a portion of the unallotted lands in the Cheyenne River Indian Reservation, in South Dakota, to the Milwaukee Land Company for town-site purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized, under such rules, regulations, and conditions as he may prescribe, to sell * * * unallotted lands in the Cheyenne River Indian Reservation, in the State of South Dakota, for town-site purposes. * * * the proceeds thereof except as hereinafter provided shall be credited to the Indians in the manner and form prescribed in section six of the Act of May twenty-ninth, nineteen hundred and eight: * * *

Act of February 14, 1913, 37 Stat. 675

An Act to authorize the sale and disposition of the surplus and unallotted lands in the Standing Rock Indian Reservation, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Standing Rock Indian Reservation, in the States of South Dakota and North Dakota, lying and being within the following described boundaries, to wit: * * *

Sec. 6. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums of which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization: *Provided,* That from any moneys in the Treasury to the credit of the Standing Rock Indians derived from the proceeds arising from the sale and disposition of their portion of the surplus and unallotted lands disposed of under section six of the Act approved May twenty-ninth, nineteen hundred and eight, the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to distribute and pay to each of the Indians belonging to said tribe and entitled thereto a sum not exceeding forty dollars per capita. * * *

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 527.

THE SIOUX TRIBE OF INDIANS, *Petitioner*,

v.

THE UNITED STATES.

MEMORANDUM IN REPLY TO BRIEF FOR THE UNITED STATES.

The reference on page 5 of the brief for the United States to page 134 of the record points up our complaint of the treatment we have received at the hands of the Court of Claims.

In No. 526, in order to justify charging the Indians with more than they were credited with, under a statute which authorized the offset of gratuities, the Court of Claims held:

> "These deficits represent gratuitous expenditures from public funds for the benefit of the bands of plaintiff tribe * * *" [No. 526, R. p. 99].

But after the amendment of 1946 restricted the offset of gratuitous expenditures, the Court of Claims, on remand, says:

"The sums set up and claimed in the supplemental petition were not monies given to or expended from public funds gratuitously for benefit of plaintiff * * *" [No. 527, R. p. 134].

The sums mentioned in the second quotation are part of the deficits mentioned in the first.

To us this seems "fast and loose" rather than "fair and honorable".

Respectfully submitted,

RALPH H. CASE,
Attorney for Sioux Tribe of Indians,
National Press Building,
Washington, D. C.

Of Counsel:
JAMES S. Y. IVINS.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 527

THE SIOUX TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 129-135) is reported at 78 F. Supp. 793. An earlier opinion (R. 72-116) is reported at 105 C. Cls. 725.

JURISDICTION

The judgment of the Court of Claims was entered on June 28, 1948 (R. 136). A motion for new trial was denied on November 1, 1948 (R. 136). The petition for writ of certiorari was filed on Jan-

uary 28, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1255(1).

QUESTION PRESENTED

Whether expenditures made by the United States pursuant to section 17 of the Act of March 2, 1889, 25 Stat. 888, may be applied in satisfaction of claims of the petitioner against the United States.

STATUTE INVOLVED

Sections 2 and 11 of the Act of August 13, 1946, 60 Stat. 1049, 1050, 1052, provide in part:

> SEC. 2. * * *
>
> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or

highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

SEC. 11. Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: *Provided,* That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has been or will be authorized: *Provided further,* That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.

STATEMENT

This case is companion to No. 526.

Petitioner brought the five suits embraced in this petition to recover what was due from the United States for the sale of unallotted lands in the reservations previously set up by the Act of March 2, 1889, 25 Stat. 888 (R. 2-31). The Court of Claims found that petitioner was entitled to recover for principal and interest a total of $2,423,-166.15 (R. 115). It found that the United States was entitled to credits in an equal amount and accordingly that petitioner was not entitled to judgment (R. 115-116). These credits resulted from the expenditures made by the United States to allottees under section 17 of the 1889 Act (see R. 134).

When, as in No. 526, the judgment against petitioner was vacated and the cause remanded to determine the effect of the Act of August 13, 1946, 60 Stat. 1049 (329 U. S. 685), petitioner filed a supplemental petition in the Court of Claims asserting that Section 2 of the Act of August 13, 1946, *supra*, pp. 2-3, barred the Government from taking credit for certain of the expenditures made by it (R. 119-125), and the United States moved to dismiss (R. 126-127). On June 28, 1948, the court granted the Government's motion (R. 136) and on November 1, 1948, it denied petitioner's motion for a new trial.

ARGUMENT

Petitioner's contention (Pet. 4-6) that the Act of August 13, 1946, would deny the United States

credit for expenditures to allottees under section 17 of the Act of August 2, 1889, must fail for the reasons advanced in the Government's brief in opposition in No. 526.

Its further contention (Pet. 6-9) that, in any event, certain of these expenditures were made after enactment of the statutes authorizing sale of the unallotted lands and hence could not be "offset" because of section 2 of the Act of August 13, 1946, is equally erroneous. Section 2 (pp. 2-3, *supra*) provides that "money or property given to or funds expended gratuitiously for the benefit of the claimant" may under certain circumstances be set off against any award but that "monies spent for * * * expenditures made prior to the date of the law * * * under which the claim arose * * * shall not be a proper offset against any award." Thus, the provision refers to gratuitous expenditures, gifts made by the United States. See *Seminole Nation* v. *United States,* 316 U. S. 286, 308-309. But, as the court below held (R. 134), the expenditures under section 17 were not gratuitous; it was intended they should be repaid. Strictly speaking, they are credits rather than offsets. Therefore, they are not covered by section 2 and—whether made before or after the statutes under which petitioner's claims arose—were rightly applied to satisfy the Government's obligation under those claims.

CONCLUSION

The decision below is correct and the case does not warrant review. The petition for a writ of certiorari should therefore be denied.

Respectfully submited,

PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
JOHN F. COTTER,
JOHN R. BENNEY,
Attorneys.

MAY, 1949.

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